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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARSHALL DELANO HARRIS, Defendant and Appellant.	B207342 (Los Angeles County Super. Ct. No. SA062540)

APPEAL from a judgment of the Superior Court of Los Angeles County. Katherine Mader, Judge. Affirmed.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Marshall Harris appeals his conviction of assault by means likely to produce great bodily injury, alleged as a hate crime, and various sentence enhancements. Although he presents alternative theories of error, at the heart of each is the claimed improper admission into evidence of statements he made to the police. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

As appellant's challenge to his conviction focuses on statements he made following his arrest, we need not detail the grizzly facts of this unprovoked attack on victim A.C. It is enough to state that in December 2006 A.C. was jogging one morning near where she lived. Appellant crossed her path and, without uttering a sound, started to hit her in the face, especially around the eyes. The beating lasted for several seconds, causing A.C. to fall to the ground and assume a fetal position. A.C. suffered significant trauma, including shattering of the bones in the vicinity of her right eye. Titanium mesh plates were inserted around her eye. These plates are intended to be permanent. Injuries resulting from the trauma may last a lifetime.

A construction worker witnessed the assault. Three days later, the worker saw appellant in the same neighborhood, police were called and, after the witness made an in field identification, appellant was arrested.

At the police station, appellant was interviewed by Detective Lucy Nunez. Before the interview, appellant was read his Miranda rights, and said he understood them. He did not expressly waive those rights. The audio tape of the interview was played as part of the prosecution's case, and a transcript of the recording is included in the clerk's transcript on appeal. The transcript included the following:

> "[Det. Nunez]: If – if there's some reason you had for – for what your actions were, I wanna' know. I wanna' know if there was a misunderstanding. If there was something that she said that upset you, and, that's why you reacted

	that way. 'Cause, you know, a lot of times, people [lose] their tempers.
[Appellant Harris]:	Well, for one thing, I have these statements, and I change 'em all the time.
N:	Hum.
H:	And, I wanted to know if I could get some white girl pussy.
N:	Is that what –
H:	Now, if they can't explain that –
N:	Is that what you asked her?
H:	I didn't ask her that. No.
N:	No?
H:	But, I've asked before, and people act like they don't – they don't care.

¶ . . .

N:	So, why was it that you hit her?
H:	I just beat her up.
N:	For no reason?
H:	Yeah.
N:	You were angry that day.
H:	Yeah, you could call it angry.

¶ . . .

H:	Yeah. I think. Let me get another look. Yeah, that's her.

N: That's her.
So, she was running towards you?

H: Yeah.

N: Is that what upset you?

H: Well, I am upset at all of you, because if you don't – you know, you – you givin' mixed messages – not mixed messages – you're not gettin' to the point. You didn't explain the question that I asked 'em, which is disrespect. They're holdin' onto my respect, here, in America. I mean –

N: Are you upset, like, just towards women? Towards us?

H: I'm – I'm upset at all white people and – I'm upset at every – I'm upset at everybody in America, and I wanted all white people to know I'm not leavin' America. What – I mean, what do they think this is, Star 80? I mean, they're not gonna' be respected. They –

N: Why would they want you to leave America?

H: Well, first of all, because they – they don't like me sexually, or whatever, because of something I did when I was young with a white girl.

N: Hum.

H: Which they don't know if I did it on purpose or not. They don't know that, but they been dissin' me, makin' me look bad, and they gonna' – they gonna' – you know, they holdin' on – they don't have to get anything. I mean – and – and – and the – and the point is – yeah, they are holdin' onto my respect, now, so – if they cannot do it, they should have stopped it and let me know. I mean, they should have – they – they – we should have something goin' on where I can understand if any of those single, white girls wanna' do that with me because of those statements – and,

made that girl that I messed up with when I was young not care, if she don't.

¶ . . .

N: Well, you really did, because you really hurt her – her eye, and her – her face pretty bad.

H: Well, they're pretty disrespectful.

N: Well, I don't know what – what kinda' point you're tryin' to make as far as what – the statements that they're making, and you think they're being disrespectful. Hitting a woman is not gonna –

H: It's not – well, she don't have any rank with me. Okay?

N: Um.

H: And, she think I'm gonna' sit by and let her molest me in front of an entire world of people, the white girl's crazy. Okay? And, I don't wanna' hear nothin'. I *** respect nobody. Now.

Now, if they wanna' clear up, so we don't have any more problems, we can start now. We can find out if any of those single, white girls is lying to me, because that is my money, if she is."

Appellant was charged with one count of aggravated assault and that he personally inflicted great bodily injury. Primarily based on the interview with Detective Nunez, it was also alleged that the attack on A.C., a white woman, by appellant, an African-American man, was a hate crime under Penal Code section 422.75, subdivision (a). Finally, the information alleged that appellant had previously committed a serious or violent felony. The case was tried before a judge without a jury. At trial, both A.C. and the construction worker identified appellant. Another prosecution witness, also Caucasian, testified that in an incident a few years before the A.C. assault, appellant had

struck him first with appellant's automobile and then with fists and feet. This evidence was offered to support the hate crime allegation and was the factual underpinning for the prior violent felony conviction. The court found appellant guilty. It found true all the enhancing allegations, including the hate crime, and sentenced appellant to 18 years in state prison.

DISCUSSION

Appellant makes the following arguments, all founded on his interview with the police: (1) His statements were involuntary and obtained in violation of his M*iranda* rights; (2) The issue was not waived on appeal by counsel's failure to object at trial; and (3) If this court were to find waiver, then appellant's trial attorney provided ineffective assistance of counsel. We conclude the issue was waived and do not reach the other two points.

Prior to the questioning of a suspect in custody, the police must give *Miranda* warnings and obtain a waiver of the rights embodied in those warnings. (*Miranda v. Arizona* (1966) 384 U.S. 436, 478-479.) A waiver must be knowing, intelligent and voluntary, and generally cannot be presumed from a silent record. (See *People v. Lilliock* (1965) 62 Cal.2d 618, 622; 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Trial § 133, at pp. 212-214.) A waiver need not be express, however, and may be implied from the circumstances. (*People v. Whitson* (1998) 17 Cal.4th 229, 244-248; 5 Witkin & Epstein, *supra*, § 134, at pp. 214-216.) Implied waiver cases often involve a defendant who is admonished affirmatively and states he understands his rights, then proceeds to answer questions without expressly stating that he waives or gives up those rights. (E.g., *People v. Sully* (1991) 53 Cal.3d 1195, 1233; see *North Carolina v. Butler* (1979) 441 U.S. 369, 374-375.)[1]

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[1] In the cases discussed in respondent's brief, police investigators generally asked the appellant if he understood his constitutional rights and appellant replied affirmatively. (See *People v. Smith* (2007) 40 Cal.4th 483, 503; *People v. Whitson*, *supra*, 17 Cal.4th at pp 237-238, 249; *People v. Davis* (1981) 29 Cal.3d 814, 823-824; *People v. Johnson*

Respondent argues that we should not decide whether appellant's statements met *Miranda* scrutiny because the issue has been waived by appellant's failure to object to Detective Nunez's testimony. We agree. By statute, the erroneous introduction of evidence is not a ground for reversal unless a proper objection to admissibility was made in the trial court. (Evid. Code, § 353.) Our Supreme Court has held that this rule applies to claimed *Miranda* violations. "The rule requiring specificity applies to *Miranda*-based objections and motions to exclude. (*People v. Milner* (1988) 45 Cal.3d 227, 236 [246 Cal.Rptr. 713, 753 P.2d 669].) The reason for the rule is clear – failure to identify the specific ground of objection denies the opposing party the opportunity to offer evidence to cure the asserted defect. (*People v. Wright* (1990) 52 Cal.3d 367, 404 [276 Cal.Rptr. 731, 202 P.2d 211].) 'While no particular form of objection is required [citation], the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' (*People v. Williams* (1988) 44 Cal.3d 883, 906 [245 Cal.Rptr. 336, 751 P.2d 395].)" (*People v. Holt* (1997) 15 Cal.4th 619, 666 -667.) In *Holt*, defense counsel at trial had objected to the admission of the defendant's statements because the police had not tape recorded them. On appeal, he asserted a *Miranda* violation. The Supreme Court concluded the issue had been forfeited on appeal.

Appellant concedes no objection was made and that the general rule is waiver. He asks us on our own to review the ruling. Although broad language in *People v. Williams* (1998) 17 Cal.4th 148, might be construed to support such a proposition, the Supreme Court's specific admonition in that opinion negates any such intent. The court stated that, even if appellate courts are otherwise free to consider on its own certain arguments which a party cannot raise, the courts are "in fact barred when the issue involves the admission

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(1969) 70 Cal.2d 541, 558 [disapproved on another point in *People v. DeVaughn* (1977) 18 Cal.3d 889, 899, fn. 8; *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1172-1173*; People v. Riva* (2003) 112 Cal.App.4th 981, 989; *People v. Moore* (1971) 20 Cal.App.3d 444, 449-450.)

(Evid. Code, § 353) or exclusion (*id.,* § 354) of evidence." (*People v. Williams, supra,* 17 Cal.4th at pp. 161-162, fn. 6.) If the objection had been interposed below, additional testimony from Detective Nunez or the officers might have supplied any missing element to an allegedly deficient *Miranda* warning that appellant now contends for the first time exists.

Appellant's final argument is that if his trial attorney waived the *Miranda claim* by not objecting at trial, the attorney provided ineffective assistance of counsel. An IAC claim requires a showing that (1) counsel's performance fell beneath an objective standard of reasonableness; and (2) but for counsel's performance, a different result was reasonably probable. (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) On direct appeal, the incompetency of counsel must appear on the record of the trial court proceedings without resort to additional evidence. (5 Witkin & Epstein, *supra*, Trial § 226, at p. 351.) "A court reviewing the conduct of counsel must in hindsight give great deference to counsel's tactical decisions." (*People v. Holt, supra,* 15 Cal.4th at p. 713.) Although damaging on the hate crime allegation, defendant's statements were not particularly helpful to the balance of the prosecution's case, which was founded both on court records and unrefuted testimony from three percipient witnesses. Counsel might have concluded that it would be helpful to the defense for the trial court to hear defendant's rambling, shameful remarks as it tended to confirm defendant's mental illness without having defendant testify. (After a contested hearing, the court had earlier found that defendant was competent to stand trial.) Under these circumstances, we cannot say that the record itself demonstrates an absence of tactical decision to support ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

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RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.